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Office-Supreme Court, U.S.
FILED
JUN 3 1960
JAMES R. BROWNING, Clerk

No. 924

October Term, 1959

IN THE

Supreme Court of the United States

THE DISTRICT COURT OF MONTEZUMA COUNTY, COLORADO, JOHN H. GALBREATH, as Judge thereof, AND IRENE CLARK WHYTE,

Petitioners,

vs.

CLIFFORD BECHER WHYTE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Colorado (App. A. of Petition) is reported at 346 P. 2d 1012.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Do Colorado courts have jurisdiction to grant a divorce in an action between two enrolled members of the Ute Mountain Tribe of Indians both of whom are residents of the Ute Mountain Reservation where the claim for relief arose on the reservation?

STATEMENT

Irene Clark Whyte filed a complaint in divorce in the District Court of Montezuma County, State of Colorado. In her complaint she prayed for a divorce from the defendant, Clifford Becher Whyte, custody of the parties' children, division of property and other relief.

Defendant moved to dismiss the complaint on the ground that the District Court lacked jurisdiction. This motion was denied.

Clifford Becher Whyte then filed an original proceeding in the nature of prohibition in the Colorado Supreme Court raising the same jurisdictional question.

The Colorado Supreme Court held the trial court was without jurisdiction. *Whyte v. Whyte*, 346 P. 2d 1012.

From this decision, petitioners seek review on writ of certiorari.

The jurisdictional question is based upon the following facts: Both parties in the trial court were enrolled members of the Ute Mountain Tribe of Indians, and at all times material they resided on the Reservation of that Tribe. The parties were married at Towoac, Colorado, on August 5, 1952. Towoac, Colorado, is within the boundaries of the Reservation. These facts appear in the complaint filed in the trial court by Mrs. Whyte and are admitted by Whyte's motion to dismiss. These facts also appear in the complaint filed in the Colorado Supreme Court and they are admitted in the answer filed there.

The Ute Mountain Tribe of the Ute Mountain Reservation is a self-governing body and has enacted rules and regulations concerning divorce. The Tribe has a tribal court for the determination of domestic relations matters and disputes among members of the Tribe (Exhibits B and C to the complaint in prohibition).

Based upon these facts the Colorado Supreme Court held that the tribal court had exclusive jurisdiction over the divorce action and that the Colorado court had no jurisdiction.

ARGUMENT

I

THIS COURT HAS RECENTLY DETERMINED THE SAME FEDERAL QUESTION

Rule 19 (1) (a) is relied upon by petitioners as the basis of jurisdiction on write of certiorari:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

We have some doubt that a holding by the Colorado Supreme Court limiting the jurisdiction of inferior Colorado state courts presents a substantial federal question. However, it is not necessary to rely upon this because *the same federal question was determined by this court on January 12, 1959. Williams v. Lee*, 358 U.S. 217.

In that case, Lee, a white man, brought a civil action against an Indian. The dispute arose from the sale of goods on the reservation. The Court said, 358 U.S. 223:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there * * *."

Here we have a civil action between Indian and Indian. The marriage took place on the Reservation. The claim for relief arose there. The rule of the Williams case applies to this case, and the Colorado courts have no jurisdiction. Accordingly, the Colorado Supreme Court decided the identical question theretofore determined by this court, and in addition decided it in accord with applicable decisions of this court.

It is obvious that unless petitioners can distinguish *Williams v. Lee*, they have no grounds on which to seek certiorari. Beginning on page 12 of their brief, they claim these distinctions.

1. The Williams case involved an action by a non-Indian against an Indian. This is a difference without a distinction. Manifestly, in an action between two Indians, the Colorado courts would have less basis for jurisdiction than Arizona where the action was between white and Indian.

2. "Arizona had expressly disclaimed jurisdiction over Indian lands in its enabling act as well as in its constitution. Unlike Arizona, the State of Colorado has never disclaimed jurisdiction over Indian Reservations. See *United States v. McBratney*, 104 U.S. 621."

True, Colorado did not disclaim, but it is entirely clear that this failure does not confer jurisdiction on the Colorado courts to handle Indian affairs. This argument was rejected in *Donnelly v. United States*, 228 U.S. 243. Nor is this the reasoning of this court in *Williams v. Lee*.

United States v. McBratney, 104 U.S. 621, is cited by petitioners. It held that Colorado had jurisdiction to try a murder case where one *white man* killed another *white man* on the Reservation. But in *Williams v. Lee*, 358 U S. 217, 219-220, the Court said that this rule did not apply to cases involving Indians.

3. It is claimed that 21 Stat. 199, 204, gives petitioner Irene Clark Whyte the right to sue in Colorado courts. Petitioners are in error for these reasons:

(a) The section cited by petitioners on page 4 of their brief provides that upon the completion of "allotments" the "allottees" shall be subject to state laws. But there is not a single word in the record showing that either of the Whytes lived on allotted land or that either of the Whytes were allottees.

(b) It is a matter of public record that it is not allotted land: House Report No. 2680, 83d Cong., 2d Sess., September 20, 1954, Report With Respect To The House Resolution Authorizing The Committee On Interior and Insular Affairs To Conduct An Investigation Of The Bureau Of Indian Affairs Pursuant To House Resolution 89, 83d Cong., page 298.

Consolidated Ute, Ute Mountain (p. 297)

"(c) The members of this tribe of Indians all live on tribal land. They have no allotments nor assignments, with the exception of the Allen Canyon group in Utah who were given allotments."

See also, House Report No. 2503, 82d Cong., 2d Sess., pages 1008-1009.

(c) There is authority for the proposition that even if it were allotted land, Colorado would not have jurisdiction. See *United States v. Nice*, 241 U.S. 591.

There are no valid distinctions between this case and *Williams v. Lee*, and the questions were answered by this Court in 1959. There is no valid reason to grant certiorari.

Petitioners argue (brief p. 13) Mrs. Whyte was denied equal protection of the law. This cannot be if Mr. Hugh Lee was afforded equal protection in *Williams v. Lee*.

Finally, petitioners say that this is a common law marriage; that under tribal law such a marriage is not recognized; and, accordingly, that Colorado courts have jurisdiction. This argument fails for these reasons:

(1) Petitioner Irene Whyte alleged a marriage, and that averment is admitted by the motion to dismiss.

(2) Whether there is a marriage depends upon tribal law, not upon state law. *Raymond v Raymond*, 8 Cir., 83 F. 721; *Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N.W. 602. See also *United States v. Quiver*, 241 U.S. 602.

(3) If a valid marriage under state law is proved, the

tribal court has jurisdiction to divorce. *Cyr v. Walker*, 29 Okla. 281, 116 P. 931.

(4) Petitioners seek to base jurisdiction on the existence or nonexistence of the marriage — one of the elements which must be proved on trial. Obviously, jurisdiction is not to be determined on the asserted merits of petitioner Irene Whyte's case.

II

THE DECISION BELOW IS CLEARLY CORRECT

The Colorado Supreme Court applied the doctrine of *Williams v. Lee*. Accordingly the decision is clearly correct. Numerous other cases dictate the same result. *United States v. Quiver*, 241 U.S. 602; *Nofire v. United States*, 164 U.S. 657; *Raymond v. Raymond*, 8 Cir., 83 F, 721; *Boyer v. Dively*, 58 Mo. 510. See also Cohen, *Federal Indian Law*, p. 137; and *Native American Church v. Navajo Tribal Council*, 10 Cir., 272 F. 2d 131.

CONCLUSION

The petition for a writ of ceritorari should be denied.

Respectfully submitted,

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